

Daylight Grocery Company, Inc. and Retail Store Employees Union, Local 441, affiliated with United Food & Commercial Workers International Union, AFL-CIO. Case 12-CA-9520

June 24, 1981

DECISION AND ORDER

Upon a charge filed on January 20, 1981, by Retail Store Employees Union, Local 441, affiliated with United Food & Commercial Workers International Union, AFL-CIO, herein called the Union, and duly served on Daylight Grocery Company, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 12, issued a complaint on February 17, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 21, 1980, following a Board election in Case 12-RC-5852, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about November 11, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 2, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 23, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 27, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause, and a supplemental brief, and the General

Counsel filed in opposition to Respondent's supplemental brief.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent in effect attacks the certification of the Union as the bargaining representative of the employees in the unit found appropriate by asserting that the unit found appropriate by the Board is inappropriate and that the Regional Director and the Board made erroneous findings of fact and law concerning objections to conduct of the election.

Our review of the record, including that in Case 12-RC-5852, shows that, following a hearing in that representation proceeding, the Regional Director for Region 12 issued a Decision and Direction of Election and an Erratum in which he ordered an election among the employees in the unit he found appropriate. Thereafter, the Board denied the Employer's request for review of the Regional Director's Decision. Subsequently, following an investigation of objections to the election and challenged ballots, the Regional Director issued his Supplemental Decision and Order on Objections and Challenged Ballots. Thereafter, the Board denied the Employer's request for review of the Regional Director's Supplemental Decision and, on October 21, 1980, the Regional Director certified the Union as the collective-bargaining representative of the employees in the unit found appropriate.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.²

In its answer to the complaint and its briefs to the Board in response to the Notice To Show Cause, Respondent asserts that the Regional Director's adverse interim rulings in the representation case "could have been influenced by pecuniary interests" created by the Senior Executive Service incentive program established by the Civil Service Reform Act of 1978, 5 U.S.C. 2301, *et seq.* In support of this contention, Respondent submitted documents including one provided to the regional directors by the then General Counsel dated May 1979, explaining the Performance Appraisal System for regional directors under the Senior Executive Service, and a July 1979 memo to his staff from the Regional Director for Region 12 pertaining to the

¹ Official notice is taken of the record in the representation proceeding, Case 12-RC-5852, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941), Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

handling of requests for extension of time to file briefs. This latter memo relates information concerning the availability to parties of means to insure the timely receipt of transcripts from the reporting service, thus alleviating much of the need for an extension of time for a party to file a brief.

Our review of the representation proceeding reveals that the Hearing Officer's and the Regional Director's interim rulings were objected to in Respondent's objections to the conduct of the election and in its exceptions to the Regional Director's Supplemental Decision. Specifically, Respondent objected, as it does in this proceeding, to the Regional Director's granting of a 3-day extension of time for the filing of briefs rather than the 24-day extension requested. Implicit in our denial of Respondent's request for review of the Regional Director's Supplemental Decision was a determination that the Regional Director had not abused his discretion in this matter.

In this proceeding, Respondent presents no new evidence that the Regional Director abused his discretion, but merely presents the conjectural argument that the Regional Director's actions "could have been influenced" by a desire for a monetary reward for efficient performance in the handling of litigation.

We note that the rapidity with which representation cases are processed is but one of the many factors considered under the Senior Executive Service compensation plan, as are the quality of the Regional Director's decisions, achievement of Agency programs, and other matters which fall within his responsibility. Further, as noted above, the Board, the members of which are not in the Senior Executive Service, affirmed the actions of the Regional Director in the representation proceeding based on the evidence then presented.

Thus, all issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence of probative value, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Daylight Grocery Company, Inc., is a Florida corporation engaged in the operation of retail grocery stores in Jacksonville, Florida. During the 12-month period ending February 17, 1981, it received gross revenues in excess of \$500,000 from the operation of its stores and has purchased and received at its Jacksonville, Florida, stores, goods, supplies, and materials valued in excess of \$50,000 from suppliers located outside the State of Florida.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Retail Store Employees Union, Local 441, affiliated with United Food and Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including baggers, employed by Respondent at its facilities located at 4714 Soutel Avenue, 4045 Post Street, 3000 Moncrief Road, and 1315 Kings Road, Jacksonville, Florida; *excluding* all store managers, assistant store managers, meat department employees, produce department managers, stock managers, guards and supervisors as defined in the Act.

2. The certification

On June 6, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 12, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit

on October 21, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about October 30, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 11, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since November 11, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a*

Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Daylight Grocery Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Store Employees Union, Local 441, affiliated with United Food & Commercial Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees, including baggers, employed by Respondent at its facilities located at 4714 Soutel Avenue, 4045 Post Street, 3000 Moncrief Road, and 1315 Kings Road, Jacksonville, Florida; *excluding* all store managers, assistant store managers, meat department employees, produce department managers, stock managers, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since October 21, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 11, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent,

Daylight Grocery Company, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees Union, Local 441, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees, including baggers, employed by Respondent at its facilities located at 4714 Soutel Avenue, 4045 Post Street, 3000 Moncrief Road, and 1315 Kings Road, Jacksonville, Florida; *excluding* all store managers, assistant store managers, meat department employees, produce department managers, stock managers, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

Post at its Jacksonville, Florida, facilities at 4714 Soutel Avenue, 4045 Post Street, 3000 Moncrief Road, and 1315 Kings Road copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in

conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Retail Store Employees Union, Local 441, affiliated with United Food & Commercial Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time employees, including baggers employed at by the Respondent at its facilities located 4714 Soutel Avenue, 4045 Post Street, 3000 Moncrief Road, and 1315 Kings Road, Jacksonville, Florida; *excluding* all store managers, assistant store managers, meat department employees, produce department managers, stock managers, guards and supervisors as defined in the Act.

DAYLIGHT GROCERY COMPANY

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."